

**Thye Ah Chai (t/a Kent Naga Enterprise) v Teraju Mercu
Construction & Engineering Sdn Bhd** A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO R-02(IM)(NCVC)-2258-09 OF 2012 B
ZAHARAH IBRAHIM, ANANTHAM KASINATHER AND MAH
WENG KWAI JJCA
24 APRIL 2013

*Civil Procedure — Judgments and orders — Default judgment — Setting aside, of
— Appeal against — Application five months out of time — Leave to file
application or extension of time not stated in order setting aside judgment in default
(‘JID’) — Whether court failed to consider reasons for delay — Whether reasons
provided for delay frivolous — Whether default judgment reinstated — Rules of the
High Court 1980 O 13 r 8 & O 42 r 13* C D

The appellant served a writ of summons on the respondent by post and subsequently obtained judgment in default (‘JID’) of appearance. Following the commencement of garnishee proceedings by the appellant, the respondent filed an application seeking, inter alia, leave to file the application out of time; leave to file an application pursuant to O 13 r 8 of the Rules of the High Court, 1980 (‘RHC’) and for the setting aside of the JID. The learned judge made an order setting aside the JID. However, neither the order nor the grounds of decision made any reference to the respondent’s prayers for extension of time or leave to file the application pursuant to O 13 r 8. E F

Held, allowing the appeal and reinstating the default judgment with costs:

- (1) The application to set aside the JID here was filed beyond the time prescribed by O 42 r 13 of RHC by a period in excess of five months (see para 5). G
- (2) Order 42 r 13 is mandatory and an applicant filing an application beyond the prescribed time limit is obliged to provide cogent reasons for any delay (see para 6); *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 followed. H
- (3) There had been no consideration of the reasons for the delay advanced by the applicant for filing the application out of time nor any reasons included in the judgment of the court as to why the judge chose to exercise his discretion by hearing the application for leave to set aside the judgment without evaluating the evidence proffered by the applicant for the delay behind the filing of the application. The judge appeared to have not made any ruling on the application for leave to file out of time (see para 7). I

- A (4) The reasons provided by the respondent for the delay were so frivolous, that they ought to have been rejected by the court. The judge's failure to address this issue, warranted appellate intervention (see para 8).

[Bahasa Malaysia summary]

- B Perayu menyerahkan writ saman ke atas responden melalui pos dan kemudiannya memperolehi penghakiman ingkar kehadiran ('PIK'). Berikutan permulaan prosiding garnisi oleh perayu, responden memfailkan permohonan memohon, antara lain, izin untuk memfailkan permohonan luar masa; izin untuk memfailkan permohonan berikutan A 13 k 8 Kaedah-Kaedah
- C Mahkamah Tinggi 1980 ('KMT') dan untuk mengetepikan PIK tersebut. Hakim yang bijaksana membuat perintah mengetepikan PIK tersebut. Walau bagaimanapun, tidak perintah tersebut atau alasan-alasan keputusan membuat apa-apa rujukan kepada permohonan responden untuk pelanjutan masa atau izin untuk memfailkan permohonan berikutan A 13 k 8.

- D **Diputuskan**, membenarkan rayuan dan mengembalikan penghakiman ingkar dengan kos:

- E (1) Permohonan untuk mengetepikan PIK di sini difailkan melampaui masa yang ditetapkan oleh A 42 k 13 KMT dengan tempoh lebih lima bulan (lihat perenggan 5).
- F (2) Aturan 42 k 13 adalah mandatori dan seseorang pemohon yang memohon permohonan melampaui masa yang ditetapkan adalah bertanggungjawab untuk memberikan alasan-alasan yang menyakinkan untuk apa-apa kelewatan (lihat perenggan 6); *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 diikuti.
- G (3) Tiada pertimbangan terhadap alasan-alasan untuk kelewatan yang dikemukakan oleh pemohon untuk pemfailan permohonan luar masa atau apa-apa alasan yang dimasukkan dalam penghakiman mahkamah terhadap mengapa hakim memilih untuk melaksanakan budi bicaranya dengan mendengar permohonan untuk izin untuk mengetepikan penghakiman tanpa menilai keterangan yang diberikan oleh pemohon untuk kelewatan disebalik pemfailan permohonan tersebut. Hakim seperti tidak membuat apa-apa perintah ke atas permohonan untuk izin memfailkan di luar masa (lihat perenggan 7).
- H (4) Alasan-alasan yang diberikan oleh responden untuk kelewatan adalah tersangat remeh, bahawa ia patut ditolak oleh mahkamah. Kegagalan hakim untuk menilai isu ini, mewajarkan campur tangan mahkamah
- I rayuan (lihat perenggan 8).]

Notes

For cases on default judgment, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 4847–4857.

Cases referred to

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223, CA (folld)

Legislation referred to

Rules of the High Court 1980 O 13 r 8, O 42 r 13

Appeal from: Civil Suit No 22 NCVC-40-12 of 2011

Ejerald Mak (Vello Kader & Shah) for the appellant.

Mohd Zaidan (Haffiz Zuhair & Co) for the respondent.

Anantham Kasinather JCA (delivering judgment of the court):**BACKGROUND FACTS**

[1] The appellant filed a claim against the respondent vide writ of summons dated 1 December 2011. The writ was served by post and the affidavit of service filed on 28 December 2011. Judgment in default of appearance was entered for the liquidated claim prayed for in the statement of claim on 29 December 2011.

[2] Following the entry of the default judgment, the appellant commenced garnishee proceedings and obtained an order to garnish monies of the respondent with its employer, Perbadanan Kemajuan Ekonomi Negeri Perlis. Incidentally, the judgment obtained by the appellant arose from a contract awarded by Perbadanan Kemajuan Ekonomi Negeri Perlis to the respondent with the appellant being the subcontractor of the respondent in respect of the same contract.

[3] The respondent did absolutely nothing upon the receipt of the writ of summons until the service of garnishee order on it. Following the receipt of the garnishee order, the respondent filed a summon in chambers dated 10 June 2012 seeking, inter alia, leave to file the summons out of time; leave to file an application pursuant to O 13 r 8 of the RHC 1980 and for the setting aside of the default judgment of 29 December 2011.

[4] Several affidavits were filed by both parties in support and in opposition to the summons in chambers of the respondent. The learned trial judge made an order setting aside the default judgment vide an order dated 29 August 2012. Neither the order of court of 29 August 2012 nor the grounds of decision of the learned trial judge makes any reference to the respondent's prayers for extension of time or leave to file the application pursuant to O 13 r 8. His Lordship seems to have dealt solely with the prayer for the setting aside of the

A default judgment order.

DECISION OF THE COURT

B [5] Under O 42 r 13 of the RHC 1980, every application to set aside a judgment must be filed and served on the party who has obtained the judgment within 30 days of the receipt of the order or judgment by the applicant. It is common ground that the application to set aside the default judgment was filed beyond the time prescribed by O 42 r 13 by a period in excess of five months. The only ground advanced by the respondent for the delay in filing the application outside the time limit is to be found in para 36 of the supporting affidavit. This paragraph reads as follow:

D Saya menegaskan bahawa kelewatan tersebut adalah semata-mata atas alasan bahawa saya merasakan tuntutan tersebut adalah salah sama sekali dan tidak akan dilayan oleh Mahkamah yang Mulia ini tanpa menyedari bahawa saya terpaksa mempertikaikannya di Mahkamah terlebih dahulu sebelum ia di tolak oleh Mahkamah yang Mulia ini.

E Additionally, in para 37 of the same affidavit, the respondent impliedly averred that he deemed it necessary to apply to set aside the default judgment only when the respondent's interest in its project with Perbadanan Kemajuan Ekonomi Negeri Perlis was compromised.

F [6] There is a plethora of authorities to the effect that O 42 r 13 is mandatory and that an applicant filing an application beyond the prescribed time limit is obliged to provide cogent reasons for any delay. We need cite only one authority in support of this proposition. This court in the case of *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 opined through the judgment of Gopal Sri Ram JCA (as he then was) in a case also involving an application to set aside a default judgment that:

G It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.

H In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.

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[7] A careful examination of the judgment of the learned trial judge suggests

that His Lordship after satisfying himself that the default judgment was regularly obtained, thereafter proceeded to consider whether there were merits in the proposed defence of the respondent. Upon being satisfied that the proposed defence had merits, His Lordship then proceeded to set aside the default judgment obtained by the appellant. With respect, there appears to have been no consideration of the reasons for the delay advanced by the applicant for filing the application out of time nor any reasons included in the judgment of the court as to why His Lordship chose to exercise his discretion by hearing the application for leave to set aside the judgment without evaluating the evidence proffered by the applicant for the delay behind the filing of the application. Indeed, as explained earlier, His Lordship appears to have not made any ruling on the application for leave to file out of time.

[8] On the hearing of this appeal, we allowed this appeal because as explained earlier, His Lordship did not have any regard to the pronouncements of this court in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* when exercising the discretion to entertain the application for leave to set aside the default judgment notwithstanding that the application was filed some five months after the time permitted by O 42 r 13. In our judgment, the reasons provided by the respondent for the delay are so frivolous, that they ought to have been rejected by the court. The learned trial judge's failure to address this issue, in our judgment, warrants appellate intervention. Accordingly, on the conclusion of the hearing of this appeal, we ordered the reinstatement of the default judgment order of 29 December 2011. We also ordered the respondent to pay costs of RM5,000 to the appellant. Deposit refunded to the appellant.

Appeal allowed and default judgment reinstated with costs.

Reported by Kanesh Sundrum